

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

LORI KAY HAVELOCK,

Debtor.

MICHAEL D. BUZULENCIA, TRUSTEE,*

Plaintiff,

vs.

LORI K. HAVELOCK, et al.,

Defendants.

CASE NUMBER 00-40073

ADVERSARY NUMBER 00-4161

M E M O R A N D U M O P I N I O N

This cause is before the Court on the motion for summary judgment (the "Motion for Summary Judgment") filed by Trustee Michael D. Buzulencia (the "Trustee"). Defendant Countrywide Home Loans ("Countrywide") filed a brief in opposition to the Trustee's Motion for Summary Judgment (the "Brief in Opposition"). This Court has jurisdiction over this matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

F A C T S

On April 26, 1996, Lori Kay Havelock ("Debtor") executed a mortgage note and deed now held by Countrywide pertaining to the residence located at 639 East Eighth Street, Salem, Ohio 44460 (the "Mortgage"). The Mortgage bears the

signatures of Debtor, Dudley S. Havelock,¹ and Heather C. Beck and Steve K. Smith as witnesses. It is notarized by Steve K. Smith.²

On January 13, 2000, Debtor filed for relief under Chapter 7 of Title 11, United States Code. On December 22, 2000, the Trustee filed the present adversary proceeding to determine Countrywide's interest in the above-referenced property, asserting, among other things, that the Trustee has a superior interest in the real estate to that of Countrywide and that Countrywide should be declared an unsecured creditor of the estate. The Trustee filed the Motion for Summary Judgment and, in response, Countrywide filed the Brief in Opposition. Contradictory affidavits accompanied each respective motion. In the affidavit attached to the Trustee's Motion for Summary Judgment, Debtor attests that the only individuals present at execution of the Mortgage were herself, her ex-husband Dudley Havelock, and one representative from the title company. In contravention, however, Steve Smith attests, in an affidavit attached to Countrywide's Brief in Opposition, that in addition to Debtor and Dudley Havelock, Heather Beck and he were present

¹Dudley Havelock is listed as a second borrower on the Mortgage. However, Dudley Havelock and Lori Havelock are now divorced and none of the papers address his interest.

²Under the law of Ohio a notary can both notarize the Mortgage's acknowledgment and sign the attestation as one of the two witnesses to the signature. *Wayne Bldg. & Loan Co. v. Hoover*, 231 N.E.2d 873, 875 (1967) (citing *Read v. Toledo Loan Co.*, 67 N.E. 729 (1903)).

and signed as witnesses when the Mortgage was executed, noting that Heather Beck is no longer an employee of the title company.

D I S C U S S I O N

The Trustee asserts that the Mortgage was improperly executed under the governing Ohio law because only one individual witnessed the Mortgage execution, and accordingly, the Trustee is entitled to summary judgment granting him the authority to avoid the Mortgage lien. Section 5301.01 of the Ohio Revised Code in effect at the time the Mortgage was executed requires the signature of two witnesses to be valid and enforceable.³ Accordingly, whether two individuals witnessed Debtor's act of signing the Mortgage impacts its validity and is a material fact. The competing affidavits present an issue of material fact and summary judgment is improper. Accordingly, the Trustee's Motion for Summary Judgment is denied.

An appropriate order shall enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

³The two witness requirement of § 5301.01 of the Ohio Revised Code was eradicated by the 2002 amendment, after which, the mortgagor's signature needed only to be acknowledged or certified by a notary public (or other designated official). OHIO REVISED CODE ANN. § 5301.01 (West 2004). Although generally retroactive, § 5301.01, as amended, provides that it will not be applied retroactively if doing so were to impact vested rights. Because Debtor filed her bankruptcy petition prior to the effective date of the amendment, the Trustee's rights to avoid the Mortgage had vested and retroactive application is inappropriate.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Memorandum Opinion and Order were placed in the United States

Mail this _____ day of August, 2005, addressed to:

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